

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN WENDELL NICHOLS,

Defendant-Appellant.

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UNPUBLISHED

April 15, 2008

No. 276246

Oakland Circuit Court

LC No. 2006-208898-FC

Before: Murray, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, in the shooting death of Reynaldo Mendez. The trial court subsequently vacated the second-degree murder conviction and sentenced defendant to life imprisonment for the first-degree murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in denying his motion for a directed verdict of an original alternative charge of first-degree premeditated murder and the felony-murder charge. He also argues that the evidence was insufficient to support his conviction of felony murder.

This Court reviews de novo a trial court's decision on a motion for a directed verdict. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).<sup>1</sup>

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<sup>1</sup> This same standard is applicable to review of a trial court's decision denying a motion for a directed verdict. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

Defendant first argues that the trial court erred in denying his motion for a directed verdict with respect to the first-degree premeditated murder charge. Defendant was not convicted of this charge, but instead was convicted of the lesser included offense of second-degree murder, which the trial court later vacated. Our Supreme Court held in *People v Graves*, 458 Mich 476, 486-488; 581 NW2d 229 (1998), that where a defendant is improperly charged with a higher offense, but the jury convicts him of a properly submitted lesser included offense, reversal is warranted only where there is persuasive evidence of jury compromise. In this case, defendant acknowledges that the second-degree murder charge was proper and he does not argue that any evidence of jury compromise exists. Further, defendant was separately charged with an alternative count of first-degree felony murder and the jury found him guilty of that charge. The jury's felony-murder verdict does not support any suggestion that the second-degree murder verdict to the premeditated murder charge could be attributable to jury compromise. Therefore, any error in submitting the first-degree premeditated murder charge to the jury was rendered harmless when the jury acquitted defendant of that charge. See *Graves, supra*; *People v Moorner*, 246 Mich App 680, 682-683; 635 NW2d 47 (2001).

Defendant also argues that there was insufficient evidence of either malice or the predicate offense (larceny) to support a felony-murder conviction. We disagree. The elements of felony murder are: (1) the killing of a human being; (2) with malice, i.e., the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm would be the probable result; (3) while committing, attempting to commit, or assisting in the commission of certain enumerated felonies, larceny being one. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). The elements of larceny are (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) with felonious intent, (4) the subject matter must be the goods or personal property of another, and (5) the taking must be without the consent and against the will of the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999).

Witnesses testified that defendant pulled out a gun before his physical altercation with Mendez began. He fired it twice during the ensuing fight, where defendant and Mendez were in close proximity to one another. A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm, or from the use of a deadly weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). Witnesses also testified that defendant did not give back Mendez's marijuana or pay for it. Although some witnesses testified differently, the credibility of the witnesses was for the jury to resolve. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find that the elements of felony murder were proven beyond a reasonable doubt.

Defendant's assertion that there could be no larceny because marijuana is an illegal substance is without merit. The larceny statute prohibits a person from taking the "property of another." MCL 750.356. It does not distinguish between property that is legally or illegally possessed. Larceny can be accomplished when property is taken from a person who has a superior right of possession, even if the person does not have a superior right of title. *People v Sheldon*, 208 Mich App 331, 334; 527 NW2d 76 (1995). Although Mendez may not have legally possessed the marijuana, his right of possession was superior to that of defendant.

In a pro se supplemental brief, defendant argues that defense counsel was ineffective for failing to investigate and present the testimony of Bryant Jones, who was present at the time of the shooting. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*<sup>2</sup> hearing, this Court's review is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceeding would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant contends that Jones' testimony would have established that he acted in self-defense and that there was no larceny. However, defendant has not presented an affidavit from Jones indicating what his testimony would have been. Further, Jones testified at defendant's preliminary examination, but he did not testify that defendant acted out of fear for his life or gave the marijuana back to Mendez. Thus, the record does not support defendant's ineffective assistance of counsel claim.<sup>3</sup>

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Mark J. Cavanagh

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<sup>2</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

<sup>3</sup> Although defendant also asserts that Jones' testimony would have supported a self-defense instruction pursuant to MCL 780.971 *et seq.*, that act was not effective until October 1, 2006, after this offense was committed. 2006 PA 309. Therefore, it would not have been applicable in any event.